IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961.

**No. 422**

WILLIAM LINK,

*Petitioner,*

*vs.*

WABASH RAILROAD COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT.

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## BRIEF FOR RESPONDENT.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The respondent Wabash Railroad Company respectfully submits the following brief in support of its position that the judgment of the Court of Appeals for the Seventh Circuit herein, affirming a judgment of dismissal entered by the United States District Court for the Northern District of Indiana, upon wilful disregard by petitioner's attorney of a properly scheduled and noticed pretrial conference setting, should be affirmed.

### CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

1. Respondent submits that no constitutional provisions are substantially involved or properly presented.

2. Rules 16, 41(b), and 83 of the Federal Rules of Civil

Procedure for the United States District Courts are involved. Rule 16 and Rule 83 are set out in petitioner's brief, but Rule 41(b) is only partially quoted by petitioner; hence this latter rule is set out here:

> "*Rule 41. Dismissal of Actions* . . .
>
> "(b) *Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court*, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision *and any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." (Emphasis added.)

Also involved are the local order dated January 7, 1960, entitled "Order of the United States District Court for the Northern District of Indiana Adopting Local Rules," appearing at p. i, pamphlet, "*Rules of the United States District Court for the Northern District of Indiana, Effective March 1, 1960*," which reads as follows (omitting the heading and formal parts):

> "It is Ordered that all existing local rules of the United States District Court for the Northern District of Indiana, including rules of general, civil and criminal practice and procedure, and rules of practice and

procedure in bankruptcy, shall be and hereby are revoked as of March 1, 1960.

"It is further Ordered that the following general local rules relating to practice and procedure in this District, numbered one to twenty-two, criminal rules numbered one to three and local rules relating to practice and procedure in bankruptcy, numbered one to twenty-one, be and the same are hereby adopted, effective on March 1, 1960.

"Dated this 7th day of January, 1960."

as well as *Rule 12* (cited also by petitioner), constituting one of the rules adopted by said order, appearing at p. 7 of said rules pamphlet, and reading as follows:

"*Rule 12. Pre-Trial Conferences.* The court may hold pre-trial conferences in any civil case upon notice given to counsel for all parties."

## QUESTIONS PRESENTED FOR REVIEW.

Petitioner has added a completely new question in his brief, at p. 8, numbered (3), which was *not included in the petition for certiorari herein*, and which respondent respectfully suggests is not merely a "subsidiary question fairly comprised" within the other two questions stated in petitioner's earlier petition and present brief.

Respondent is dissatisfied with the questions as presented by the other side, and hence states the following as being the question presented:

Whether the trial court had, and properly exercised, power to dismiss the cause upon failure of plaintiff to appear through counsel at a pre-trial conference set pursuant to notice under a local rule, where plaintiff's counsel *intentionally remained in another, distant city to complete unrelated out-of-court work on the scheduled pre-trial date*, and first advised the court of his intention not to appear at the scheduled time and place.

by telephone only two and one-quarter hours before the scheduled time for the pre-trial.

## STATEMENT OF THE CASE.

Respondent submits the following, pursuant to Rule 40(3) of the Supreme Court of the United States, in order to correct what respondent believes are material errors and omissions in petitioner's argumentative "statement" of the case, and in order to furnish a correct and concise statement of the material facts. Those deemed most pertinent to the present review are italicized:

This was a personal injury case caused by plaintiff's running into the side of defendant's train at a public crossing. Upon a prior appeal, action of the District Court in dismissing the complaint for failure to state a claim was reversed. No question in petitioner's 1961 appeal was predicated upon the questions presented by the previous appeal.

Subsequent to the mandate upon the previous appeal, *the case had been set for trial July 17, 1957; on June 27, 1957, on motion of the plaintiff, defendant not objecting, a continuance was entered.* (R. 2, fourth paragraph; also, R. 3, entries headed "6-21-57" and "6-27-57.") *This trial setting and continuance are completely omitted from petitioner's statement of the case.* On August 17, 1957, the defendant filed interrogatories addressed to the plaintiff, with certificate of service attached. (R. 2, paragraph 5, and R. 4, entry headed "8-17-57.")

On February 24, 1959, *the Court gave notice that the cause would be dismissed March 25, 1959, for failure to prosecute, pursuant to a local rule, unless otherwise ordered.* On March 24, 1959, plaintiff filed answers to the 1957 set of interrogatories. After various intervening arguments, motions and briefs, the Court entered an order

on June 4, 1959, *retaining the case on the docket*, and at the same time set the case for trial July 22, 1959. *All of these proceedings are omitted from petitioner's statement of the case*, except the last portion of the June 4 order. On July 2, 1959, at defendant's request, to which plaintiff agreed, the case was continued until further assignment. (R. 2, and R. 4, entries headed "2-24-59" through "7-2-59".) *At no time did plaintiff ever seek to advance the case or seek a trial setting.*

On March 11, 1960, the defendant filed further interrogatories addressed to plaintiff. After being granted an extension of time, plaintiff filed answers to these interrogatories, other than interrogatory 3, which was not completely answered. (R. 4, entries headed "3-11-60" through "4-15-60"; R. 9.)

*On September 29, 1960, notice of a pre-trial conference to be held October 12, 1960, was sent out* (R. 14, ll. 24-25), pursuant to Local Rule 12, and on October 12, 1960, upon failure of plaintiff's counsel to appear, the order of dismissal here involved was entered. (R. 4-5, 10, and 16.) As shown in more detail below, the record facts are that *plaintiff's counsel intentionally remained in Indianapolis*, to complete unrelated, out-of-court work on the scheduled date, and first advised the court that he would not attend the scheduled pre-trial, at 10:45 a.m. on the day set for the 1:00 p.m. conference.

Thereafter, on November 10, 1960, plaintiff filed his notice of appeal. *No intervening motions were filed*, nor was any other intervening action taken by plaintiff. On November 28, 1960, at plaintiff's request, a conference was held with the trial court, but *nothing was brought before the court by the plaintiff*, and the conference terminated. (R. 5.)

The dismissal was affirmed on appeal, and as shown at

p. 2 of petitioner's petition herein, certiorari was sought on the ninetieth day following the Court of Appeals' denial of rehearing.

The events of October 12, 1960, on which date the dismissal was entered, are accurately summarized in the Court of Appeals' decision sustaining the dismissal (291 F. 2d at 544, 545; R. 20) as follows:

> "The transcript of the proceedings had in court preceding the entry of the order of dismissal reveals the following factual situation which is not disputed by plaintiff.
>
> "The district judge's secretary was called into court and requested by the court to make a statement. She said that she mailed notice of the pre-trial conference to all counsel on September 29, 1960. She gave the following report to the court:
>
> > '*He (plaintiff's counsel) called about 10:45 (on Wednesday, October 12, 1960), and said he was in Indianapolis—that he was busy preparing papers to file with the (Indiana) Supreme Court. He said he wasn't actually engaged in argument* and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon or any time Friday if it could be reset.
> >
> > 'At first he asked to talk to you, but you were on the bench, and he then asked if I could convey this to you.
> >
> > 'I asked him if he had contacted Mr. Bodle (defendant's counsel), and he said he had yesterday, and he said he couldn't be there, and I don't know, of course, if he meant for the pretrial or for the deposition.'
>
> "She stated that she told plaintiff's counsel she would convey this message to the court and opposing counsel. She also reported that this was the oldest civil case on the court docket. It further appeared that *this was the first and only attempt counsel made to have the pre-trial conference continued.*" (Emphasis added.)

The Court of Appeals further considered these facts in its opinion, at 191 F. (2d) 546, R. 23, as follows:

> "Plaintiff argues that there was adequate showing of the inability of his counsel to be present at the pre-trial conference. We disagree. *His brief refutes this contention* wherein he states, 'Plaintiff's counsel has *previously* become engaged in an important matter in the *Indiana Supreme Court*, not oral argument but preparing urgent papers of some kind, which required him to be in *Indianapolis*. As often happens in law work, the task took longer than expected, so that it occupied the day which had been set for this pre-trial conference * * *.' *With knowledge of the time and place of the pre-trial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it.* In our opinion, this falls far short of being a legitimate excuse for failing to appear in court at the time fixed." (Emphasis partially added.)

## SUMMARY OF ARGUMENT.

The petitioner has based his entire argument on two completely false premises, one of law and one of fact:

1. The false legal argument is that the trial court had no power, inherently or under Federal Rule 83, to dismiss the action upon the deliberate disregard by plaintiff's counsel of the properly scheduled and noticed pretrial conference. He is unable to cite authorities stating any such rule, for the authorities are all to the contrary.

2. The false factual argument (which necessarily ignores the fact that counsel, mindful of the scheduled pretrial, deliberately stayed in another city until it was too late for him to get to the pretrial, and then called and announced his deliberate choice to the court) is that counsel was the innocent victim of unforeseen circumstances which rendered him unable to attend the pre-

trial. This is imaginative but unrelated to the record facts.

---

The authorities uniformly recognize the power and authority of the district courts to dismiss actions *of their own motion* in appropriate situations—including situations where, as here, there has been a disregard of a properly scheduled and noticed pretrial. *Rule 41(b)*, which refers to dismissals "not provided for in this rule", recognizes and reinforces this power. Such procedure was properly followed by the trial court and approved by the Court of Appeals in the instant case.

The district court had promulgated, by general order, Local Rule 12, authorizing the holding of pretrial conferences "upon *notice* given to counsel for all parties." A pretrial scheduled and noticed thereunder is called pursuant to a court rule and order, and sanctions may be imposed for the disregard of such pretrial settings, the same as for the disregard of any other order.

The notice of the pretrial itself is sufficient to charge parties and counsel with notice that disregard of the pretrial setting may result in the imposition of sanctions, including dismissal or default.

Where the facts show, as in the present case, that counsel deliberately chose to perform other, unrelated, out-of-court work in another city, instead of going back to attend a properly scheduled and noticed pretrial, a consequent dismissal of the action is well within the trial court's discretion.

Under uniformly recognized principles, the fault of the attorney is properly chargeable to the client in such a situation.

Review of the record also shows, by way of surround-

ing circumstances, absolutely no activity by the plaintiff, at any time since the former appeal, to do anything more than to simply keep the case pending on the docket. The trial court in the exercise of its discretion, properly took these circumstances into account.

The dismissal was properly carried out under established rules of law, and is not subject to the infirmities attributed to it by petitioner.

## ARGUMENT.

### 1.

**DISREGARD OF THE PRETRIAL SETTING, WHICH RESULTED IN THE DISMISSAL, STANDS AGAINST A BACKGROUND OF PETITIONER'S GENERAL LACK OF DILIGENCE OR INTEREST.**

Plaintiff-petitioner never took any action whatever to advance this case, after its return to the trial court docket in March, 1957. The matters which petitioner declines to set out in his statement of the case, at page 9 of his present brief ("Without listing all the succeeding proceedings • • •") dealt mostly with proceedings on the court's own motion, during the period February 24-June 4, 1959, to dismiss this cause for plaintiff-petitioner's failure to take action for over one year. (R. 2, 4.)

The case was retained on the docket, *but plaintiff still never took any subsequent action*, other than to belatedly answer further interrogatories. Hence when plaintiff-petitioner's counsel deliberately stayed on in Indianapolis, on the day set for the pretrial, on unrelated out-of-court work, and made no effort to notify the court of this deliberate action until slightly more than two hours before the time set for the pretrial in Hammond (the two cities being, as petitioner states, some 160 miles apart), the action of the trial court in then dismissing the action, for failure of plaintiff's counsel to comply with the pretrial setting, obviously was not a sanction imposed against a previously diligent party or counsel.

2.

**THE PRETRIAL CONFERENCE IN QUESTION WAS DULY AUTHORIZED AND VALIDLY SCHEDULED.**

It is undisputed that the pretrial conference in question was scheduled, and notice thereof was given, pursuant to valid rules and procedures of the trial court. The Court of Appeals, in its decision affirming the dismissal herein, summary these threshold matters adequately at 291 F. (2d) 544. (R. 19.)

3.

**THE DISTRICT COURTS HAVE INHERENT POWER, PRESERVED UNDER RULE 83 AND RECOGNIZED BY RULE 41(b), TO DISMISS CASES OF THEIR OWN MOTION, FOR WANT OF PROSECUTION OR DISREGARD OF COURT ORDERS, RULES AND SETTINGS.**

The petitioner's primary argument, and his most intensely urged contentions herein, rest entirely upon the false premise that a District Court has no power to dismiss an action on its own motion, for lack of prosecution, or for disregard of its orders, rules or settings; and specifically that no such power exists with relation to disregard of pretrial proceedings. He argues, in the face of overwhelming authority to the contrary, that *Rule 41(b)* has pre-empted the entire subject of involuntary dismissals, and that the power to dismiss under the rules "could not be self-executing or be executed by the District Court on its own motion as was done here" (Petitioner's brief, p. 29); he even argues that the Court's inherent power to dismiss cases is "newly announced." (Petitioner's brief, p. 18.) In the absence of a dismissal motion by the *defendant*, he argues, the trial court is powerless to act—a novel doctrine.

*These contentions are diametrically opposed to clear*

*long-established and uncontradicted rules of law*, which are recognized and reinforced (not done away with) by Rule 41(b).

In the recent case of *Costello* v. *United States*, 365 U. S. 265, 5 L. Ed. (2d) 551 (1961), the Supreme Court recognized and discussed the effect of *sua sponte dismissals for failure to obey court orders*. The decision recognizes "• • • a *sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court • • •" as a proper type of dismissal, not specifically provided for in *Rule 41(b)*. (365 U. S. at 286-287.) Likewise, in *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 680 (n. 4), 2 L. Ed. (2d) 1077, 1081, the Court expressly pointed out that

> "While Rule 41(b) covers motions to dismiss made by defendants • • • it is not restricted to that situation."

Professor Moore states that

> "While Rule 41(b) provides that 'a defendant may move' for dismissal for want of prosecution, it has been held that a district court may—*either under this rule or Rule 83, or in the exercise of its inherent power* to keep its dockets clear—*dismiss on its own motion* for want of prosecution or provide by local rule for automatic dismissal of causes in which no action has been taken within a prescribed period. Such a local rule is not inconsistent with Rule 41(b) • • •.
>
> "What constitutes 'failure to prosecute', of course depends on the facts of the particular case • • • *(F)ailure to appear* • • • *at a pre-trial hearing* • • • *is sufficient to justify dismissal for want of prosecution.*"
>
> (Vol. 5, Moore's Federal Practice, Second Ed., sec. 41.11(2), pp. 1036-1038; citations omitted; emphasis added.)

To the same effect, see Vol. 2B, Barron & Holtzoff, *Federal Practice and Procedure*, Rules Edition, 1960 Rev., sec. 918, pp. 138-41.

(It may be noted that the petitioner, and to some extent Judge Schnackenberg in his dissent herein in the Court of Appeals, seem to assume that "want of prosecution" or "failure to prosecute" connote nothing more than inactivity over a prescribed period of time. However, a dismissal for disregard of or failing to appear at a scheduled proceeding, is also a dismissal for a particular sort of failure of prosecution. See *e. g.*, the text statements above cited from Moore and from Barron & Holtzoff. The trial court's inherent powers exist without regard to which terminology—"failure to appear" * * * "disregard of settings" * * * "failure to prosecute"—is used in a given case.)

The effect of Rule 41(b) as *recognizing and supplementing the district courts' inherent powers* was recently discussed by Circuit Judge Matthes, speaking for a unanimous court in *Janousek* v. *French*, 287 F. (2d) 616, 620-621 (C. A. 8, 1961):

> "Rule 41(b) of the Federal Rules of Civil Procedure provides that '(f)or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action * * *.' Although the rule authorizes dismissal on motion of defendant, *it is a cardinal principle of law that the court may dismiss on its own motion*, for Rule 41(b) expressly recognizes and incorporates the *inherent power* of courts to dismiss actions for lack of diligence in bringing them to trial. The authorities are legion and uniform in holding that the power to dismiss for failure to prosecute lies in the sound discretion of the court." (Emphasis added; citations omitted.)

Among the many other decisions stating and applying these principles, in cases where dismissals have been entered of the trial court's own motion, are the following:

*Slavitt* v. *Meader*, 278 F. (2d) 276, 277 (C. A. D. C. 1960); cert. denied 364 U. S. 831.

*Darlington* v. *Studebaker-Packard Corporation*, 261 F. (2d) 903, 905 (C. A. 7, 1959), cert. denied, 359 U. S. 992 (where the same attorney representing the petitioner herein unsuccessfully attacked a dismissal by the court under a local rule, as being "inconsistent" with Rule 41(b) and "violative" of Rule 83).

*Reid* v. *Prentice-Hall, Inc.*, 261 F. (2d) 700, 701 (C. A. 6, 1958).

*Wright* v. *Lumbermen's Mutual Casualty Co.*, 242 F. (2d), 1, 2 (C. A. 5, 1957); cert. denied 354 U. S. 939.

*Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F. (2d) 825, 826 (C. C. A. 10, 1948).

*Hicks* v. *Bekins Moving & Storage Co.*, 115 F. (2d) 406, 408 (C. C. A. 9, 1940).

It is not material whether a dismissal originates on motion of a party or of the court. The dismissal power exists, subject only to review for abuse of discretion, no matter how it is called into operation.

4.

**THIS DISMISSAL POWER MAY BE INVOKED, AS IN THE PRESENT CASE, UPON FAILURE OF COUNSEL TO APPEAR FOR A PROPERLY SCHEDULED AND NOTICED PRETRIAL.**

It is well established that the power may be exercised where a party or his counsel have failed to appear for a pre-trial conference:

*Blue Mountain Construction Company* v. *Werner*, 270 F. (2d) 305, 308 (C. A. 9, 1959); cert. denied 361 U. S. 931;

*Erick Rios Bridoux* v. *Eastern Air Lines*, 214 F. (2d) 207, 209 (C. A. D. C., 1954); cert. denied 348 U. S. 821;

*Wisdom* v. *Texas Co.*, 27 F. Supp. 992, 993 (N. D. Ala., 1939);

*In the Matter of 1208, Inc.*, 188 F. Supp. 664 (E. D. Pa., 1960);

Vol 3, *Moore's Federal Practice*, 2d Ed., Sec. 16.07, p. 1110;

Vol. 1A, Barron & Holtzoff, *Federal Practice and Procedure*, Rules Ed., 1960 Rev., sec. 473, pp. 842-3;

*Pretrial Procedure Committee Report*, Judicial Conference of Senior Circuit Judges, 4 F. R. D. 83, at 96,

—as well as where counsel appears at pretrial but has not complied with any of the required pretrial procedures, *Dalrymple* v. *Pittsburgh Consolidation Coal Co.*, 24 F. R. D. 260, 261-2 (W. D. Pa., 1959); or later fails to comply with the pretrial order: *Package Machinery Co.* v. *Hayssen Manufacturing Co.*, 164 F. Supp. 904 (E. D. Wis., 1958), affirmed 266 F. (2d) 56 (C. A. 7, 1959); *Syracuse Broad-*

*casting Corporation* v. *Newhouse*, 271 F. (2d) 910 (C. A. 2, 1959).

In *Wisdom* v. *Texas C.*, 27 F. Supp. 992 (N. D. Ala., 1939), cited above, dismissal was entered forthwith upon plaintiff's failure to appear at a pretrial hearing ordered by the court. The dismissal resulted from a motion by the defendant, but as shown by the many cases cited above, the initiative could validly have come from the court on its own motion. There is no substantial difference between the *Wisdom* case and the instant case.

In *Erick Rios Bridoux* v. *Eastern Air Lines*, 214 F. (2d) 207 (C. A. D. C., 1954), cert. denied 348 U. S. 821, cited above, the defendant-counter-claimant failed to appear at a scheduled pretrial, in person or by counsel, and on appeal dismissal of his counterclaim, for such failure to appear, was affirmed (although a large monetary judgment against him was set aside.) The Court of Appeals stated that his "lack of diligence in respect to his counterclaim" should be made to bear "the consequences of his default." (214 F. 2d at 210.)

As in the other cases cited, dismissal upon failure of a party to appear in person or by counsel at a pretrial hearing also was approved and affirmed in *Blue Mountain Construction Company* v. *Werner*, 270 F. (2d) 305 (C A. 9, 1959), cert. denied 361 U. S. 931 (cited above). There plaintiff had indicated its refusal to appear or proceed further, a position which the court indicated it took "at its peril." In the instant case plaintiff's counsel, by telephone from a remote point shortly before the pretrial was to begin, asserted a belated desire to proceed, at his own convenience, at a later day (though he had done nothing to affirmatively prosecute the claim for several years since the former appeal herein), but, as the Court of Appeals held, the situation thus presented was simply one where

"With knowledge of the time and place of the pre-

> trial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it." (291 F. (2d) 542, 546.)

This was nothing more nor less than a *refusal to appear and proceed at the proper time*, and was likewise a position taken "at his peril."

As early as October, 1944, the Pretrial Committee of the Judicial Conference of Senior Circuit Judges submitted a general report on pretrial procedures to the Conference, which approved the report and authorized its distribution. The report recognized the sanction of dismissal for failure to appear at scheduled pretrials, and noted that such power had been exercised already by at least "several" district judges "because of failure of plaintiff's counsel to appear." *Pretrial Procedure Committee Report*, 4 F. R. D. 83, 96. As Judge Moscowitz, of the District Court for the Eastern District of New York, has pointed out,

> "* * * once the court desides to employ (pretrial) for any of the purposes set forth in the Rule, appearance by the attorneys for a conference is mandatory and defaults or nonsuits may be entered upon their unexplained absence."
>
> (Article, printed in 4 F. R. D. 216.)

Clearly, an absence "explained" only, as in the instant case, by the *arbitrary decision of plaintiff's counsel to stay in another city and do out-of-court work on some other matter*, presents an even stronger justification for dismissal, because the possibility that the absence was unavoidable or unintentional is eliminated. Dismissal is a remedy sparingly applied, but certainly *deliberate disregard* of a scheduled pretrial (as against mere inadvertence) justifies its application.

Although not controlling, it is worth noting that in state courts, too, where pretrial procedure has been adopted, the power of the courts to dismiss for disregard of pretrial settings has been recognized and applied. Thus it has been held in Connecticut that

> "* * * the court has inherent power to provide for the imposition of reasonable sanctions to compel the observance of its rules. *Implicit in the assignment of a case for pretrial is an order that each party, through counsel, shall appear before the court*, prepared to accomplish, so far as possible, the various purposes of the hearing * * * If he comes unprepared, *he fails to comply with an order of the court, and such a failure is always ground for a nonsuit or default* * * *"

*Stanley* v. *City of Hartford*, 103 A. (2d) 148, (Sup. Ct. Errors, Conn., 1954; emphasis added).

Similarly, *Beasley* v. *Girten*, 61 S. (2d) 179 (Fla., 1952), cited by petitioner at pp. 37-38 of his brief herein, recognized the dismissal power, but the court there felt that the dismissal should have been without prejudice, and granted leave to the plaintiff "*to move for reinstatement*," providing that "*If the motion is shown to have merit*, it should be granted on conditions imposed by the Court." (61 S. 2d at 179; emphasis added.) This is simply the equivalent of granting the party *the same opportunity that was available to, and was rejected by, the petitioner in the present case under Rule 60(b) prior to this appeal.*

And the District of Columbia's Municipal Court of Appeals has approved the entry of a default judgment against a defendant whose attorney failed to appear for a pretrial conference which was apparently set only by telephone notice. *Turner* v. *Erwin*, 99 A. (2d) 222 (1953). (The trial court there properly required a separate hearing on *proof of damages*, as required in default judgments generally.

In *Universal C. I. T. Credit Corp.* v. *Stires*, 145 N. E. (2d) 541 (Ohio, 1956), quoted at pp. 38-40 of petitioner's brief, this was not done, and that case simply holds that this omission was error. The *Universal C. I. T.* case is similar in effect to *Syracuse Broadcasting Corporation* v. *Newhouse*, 271 F. (2d) 910, 914, also relied on by petitioner herein, where the Second Circuit recognized the propriety of dismissal for non-compliance with pretrial orders, but pointed out that pretrial cannot be used as a substitute for summary judgment proceedings or to rule on fact issues.)

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Petitioner asserts at 35-36 of his brief that counsel's failure or refusal to appear at the pretrial in this case involved merely "failure to comply with a local rule," and that disobedience of a *rule* is somehow a lesser offense than disobedience of an *order*. To state the argument is to reveal its lack of substance; but further, as pointed out by the Court of Appeals in its decision herein, the notice of the pre-trial conference (which was, admittedly, timely sent out and received)

> "* * * was sent pursuant to Local Rule 12 of the district court. Local Rule 12 had been promulgated by an order of the court. *Certainly a notice sent pursuant to an order of the court embodied in a court rule does and should have all the force and effect of an order of the court.* Further, plaintiff has not cited any authority requiring that a pretrial conference be scheduled by a specific court order to give it validity. It is well settled that *court rules have the force of law. Weil* v. *Neary*, 1929, 278 U. S. 160, 169, 49 S. Ct. 144, 73 L. Ed. 243." (291 F. (2d) 542, 545; emphasis added.)

This accords with *Dalrymple* v. *Pittsburgh Consolidation Coal Company*, 24 F. R. D. 260 (W. D. Pa., 1959), where a local court order had promulgated a local pretrial rule—

which was disregarded by plaintiff in failing to prepare for a subsequently scheduled pretrial—and where dismissal was entered because of such "utter disregard of the court order embodied in the Rule," 24 F. R. D. at 262. See also *In the Matter of 1208, Inc.*, 188 F. Supp. 664, 666 (E. D. Pa., 1960), where the local pretrial provisions were characterized as a "standing order," and *Stanley* v. *City of Hartford*, 103 A. (2d) 148 (Conn., 1954), discussed above, holding that "Implicit in the assignment of a case for trial is an order that each party, through counsel, shall appear * * *" 103 A. (2d) at 149-150.

5.

**NO FURTHER NOTICE WAS REQUIRED BEFORE ENTRY OF THE DISMISSAL. COUNSEL WAS CHARGEABLE WITH KNOWLEDGE OF THE POSSIBLE CONSEQUENCES OF HIS CONDUCT. IF EXTENUATING FACTS EXISTED HE STILL HAD THE RIGHT TO BRING THEM BEFORE THE TRIAL COURT UNDER RULE 60(B).**

Nor is there any substance to petitioner's claim that he was entitled to specific notice of the dismissal before its entry. *Plaintiff's counsel already had notice of the scheduled pretrial setting*, and accordingly was chargeable with knowledge that a wilful disregard of the setting might result in sanctions, including dismissal. As was true in *Tinkoff* v. *Jarecki*, 208 F. (2d) 861, 862 (C. A. 7, 1953), (a "dismissal for want of prosecution" case), this is simply a case where "*plaintiff took a calculated risk when * * * he ignored the trial judge entirely.*"

"It has often been observed that a court has inherent power to dismiss, without notice": *Janousek* v. *French*, 289 F. (2d) 616, 622, n. 5 (C. A. 8, 1961), and cases there cited. Likewise, the Tenth Circuit has held that "* * * dismissal without notice of an action for failure to prosecute with reasonable diligence does not contravene any sustainable

concept of due process with which we are familiar." *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F. (2d) 825, 826 (1948).

And of course *plaintiff was entitled to proceed under Rule 60(b), in the trial court*, to bring additional facts before the court, had there been any such meritorious facts available to him. Thus petitioner's protests, in his brief, that counsel was given no opportunity to be heard (p. 23) or to give "reasonable reasons for his absence" (p. 20) are hollow. If the trial court dismisses an action, or grants a judgment by default, against a party, the door to the trial court remains open under Rule 60(b), for the party to point out any mitigating circumstances to that court. Here the plaintiff didn't take advantage of the "open door"; although his counsel obtained a conference with the trial court on November 28, 1960, he *brought no motion before the court*, and the conference terminated without anything having been presented "upon which the court might act." (R. 5.)

6.

**THE RECORD FACTS SHOW DELIBERATE DISREGARD OF THE PRETRIAL RULE AND SETTING BY PETITIONER'S COUNSEL, AND LACK OF GOOD CAUSE THEREFOR. THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN DISMISSING THE CASE.**

Shorn of the self-serving adjectives with which petitioner's brief surrounds the facts, the situation presented for review is simply one where, as stated by the Court of Appeals herein,

> "With knowledge of the time and place of the pretrial hearing, plaintiff's counsel chose to complete his out-of-court work and called the district court and so advised it." (291 F. 2d at 546.)

He waited to do so, in a city *160 miles distant* from the courthouse (Petitioner's brief, p. 10, ll. 10-11), *until 10:45 a.m.* (R. 13, l. 14), *with the pretrial scheduled to begin at 1:00 p.m.* (R. 4, 3d line from bottom). He did not indicate that his continued physical presence in Indianapolis at that late hour was due to any accident, misfortune, or inadvertence. On the contrary, he simply stated that

> "• • • he was in Indianapolis—that he was busy preparing papers to file in the Supreme Court. He said he wasn't actually engaged in argument • • •" (R. 13, ll. 14-17.)

Under these facts, certainly the Court of Appeals was justified in holding that

> "• • • This falls far short of being a legitimate excuse for failing to appear in court at the time fixed." (291 F. 2d at 546.)

The Court of Appeals further points out that

> "In oral argument (petitioner's) counsel conceded that the district court might have disciplined him by imposing a lesser sanction • • •" (291 F. 2d at 546.)

Petitioner's counsel now denies that he made such a concession (Petitioner's brief, p. 21); but the court could certainly have "imposed a lesser sanction" for his conduct, whether or not he so concedes.

The *degree* of the sanction is the only issue. The trial court's discretion in fixing the sanction is of course exercised in light of all the circumstances of the case. The trial court fully considered the surrounding circumstances (R. 15-16), which, to state it mildly, *fail to give any indication that plaintiff attached any urgency or importance to prosecution of his claim*, and which *fail to establish that the disregard of the pretrial notice was "due to inability, and not to wilfulness, bad faith or any fault of petitioner."* Rather, they affirmatively show such wilfulness and fault.

The above quoted words were used by the Supreme Court to test the validity of a dismissal in *Societe Internationale, etc.* v. *Rogers*, 357, U. S. 197, 212, 2 L. Ed. (2d) 1255, 1267. The Court found, in that case, a due process issue where a complaint was stricken "because of a plaintiff's *inability, despite good-faith efforts*, to comply with a pretrial production order * * *," 357 U. S. at 210, 2 L. Ed (2d) at 1266 (emphasis added). *But the situation here is the very reverse*: The facts show a deliberate decision not to comply with the pretrial setting.

The non-compliance was not, as in the *Societe Internationale* case, "due to inability fostered neither by (plaintiff's) own conduct nor by circumstances within (plaintiff's) control * * *" (357 U. S. at 211; 2 L. Ed. (2d) at 1267) it was in fact due *entirely* to plaintiff's counsel's own conduct, and circumstances deliberately created by him.

The circumstances of the instant case are analogous to those in *Garden Homes, Inc.* v. *Mason*, 249 F. (2d) 71, 72 (C. A. 1, 1957), cert. denied 356 U. S. 903, which was an appeal from a judgment of the lower court ordering dismissal of a complaint with prejudice, where counsel for plaintiff failed to appear at the time of a trial setting. On the day of the hearing, plaintiff's attorney informed the clerk (by letter) "that he could not be present at the trial on Wednesday morning, March 6, in Concord, because he would be appearing before the Supreme Judicial Court of Massachusetts." 249 F. (2d) at 72. In affirming the dismissal, the Court of Appeals for the First Circuit stated:

> "*Under the circumstances, considering also other instances in the case of failure diligently to prosecute*, as pointed out by appellee, we cannot say that the district court abused its discretion in dismissing the complaint." (249 F. 2d at 72; emphasis added.)

In the instant case, the factors supporting dismissal are obviously much stronger: *Counsel had no conflicting court*

*date, but voluntarily elected to stay on in another city on other, unrelated business.* (Indeed, the trial court here indicated a willingness to take a more lenient view than did the court in *Garden Homes*, "* * * if counsel was engaged before a court or had some other reason why he could not physically be here * * *": R. 15, ll. 30-32. If any such factors existed, it is obvious they would have been brought forth in proceedings herein under Rule 60b.)

It is not an abuse of discretion for a court to dismiss an action even where plaintiff's failure to respond to a court rule was due to pressure of counsel's trial commitments in other courts. See, in addition to the *Garden Homes* case, *supra*, *Darlington* v. *Studebaker-Packard Corporation*, 261 F. (2d) 903, 905-6 (C. A. 7, 1959), cert. denied 359 U. S. 992, holding that the trial court was justified in dismissing a case where delays had been due to the fact that counsel was "under a continuous and heavy burden of trial work which could not be avoided or delayed." *Cf. Rooney* v. *City of East Chicago et al.*, 129 Ind. App. 128, 148 N. E. (2d) 842 (Ind. App., 1958) (appeal dismissed for delays resulting from the fact that appellant's counsel "was too busy elsewhere* * *") (129 Ind. App. at 133). See also *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Nebraska, 1942), in which analogous cases from a number of other jurisdictions are discussed.

7.

**RULE THAT ACTS AND OMISSIONS OF ATTORNEY ARE CHARGEABLE TO HIS CLIENT ANSWERS THE CHIEF OBJECTION RAISED IN JUDGE SCHNACKENBERG'S DISSENT.**

The last objection made by petitioner, and the chief objection made by Judge Schnackenberg in his dissent in the Court of Appeals, is that the faults or omissions of the lawyer should not be imputed to his client. This objection was properly disposed of by the Court of Appeals herein:

> "The short answer to this is that the action or lack of action on the part of counsel is that of his client." (291 F. 2d at 546.)

The rule is based on general agency principles, and is set forth in Vol. 7 *C. J. S., Attorney and Client*, sec. 67, pp. 850-851, as follows:

> "The relation of attorney and client is one of agency, that is, the attorney is the agent of the client * * *. Thus, the client is bound, according to the ordinary rules of agency, by the acts of the attorney within the scope of the latter's authority. In general, whatever is done in the progress of the cause by such attorney is considered as done by the party, and is binding on him * * *"
>
> "In general, the omissions, as well as commissions, of an attorney are to be regarded as the acts of the client whom he represents, and his neglect is equivalent to the neglect of the client himself."

The attorney is regularly summoned to court for arguments, hearings, pretrials—not as an individual, but as the agent and representative of his client. The courts operate through attorneys, acting for their clients—and not just as messengers, but as representing and standing in the shoes of their clients.

A similar contention, that plaintiff should not be penalized because of the default of counsel, was raised and held to be "without merit" in *Dalrymple* v. *Pittsburgh Consolidation Coal Co., supra,* 24 F. R. D. 260, 261 (W. D. Pa., 1959) and also in *Ledwith* v. *Storkan, supra,* 2 F. R. D. 539, 544 (D. Nebraska, 1942), where the court stated:

> "Inevitably, the argument of the defendants must proceed to the point where they assert, that having employed counsel for the protection of their interests, they did all that could be expected of them and are entitled to absolution for their attorney's negligence. But that seems not to be a tenable position, for by the weight of authority the negligence of counsel in this behalf is imputed to his client." (2 F. R. D. at 544.)

Nor is there anything to the contrary in *Allegro* v. *Afton Village Corp.,* 87 A. (2d) 430 (S. Ct. N. J., 1952), the only case cited in Judge Schnackenberg's dissent. In fact, in that case part of the court's concern was that the plaintiff had at times appeared on his own behalf, and since "the court was dealing with a layman, not an attorney, an officer of the court," the Appellate Court thought it was "problematical whether or not he fully appreciated the import of the remarks made to him" as to procuring new counsel and complying with scheduled proceedings. 87 A. (2d) at 431. No such factor exists in the present case.

It should also be noted that Indiana courts have repeatedly applied the rule that the acts and omissions of an attorney in litigation are those of the client. See *e. g., Ferrara* v. *Genduso,* 214 Ind. 99, 101-2, 14 N. E. (2d) 580 (Ind. Sup. Ct., 1938) (which also discusses a number of earlier Indiana cases applying this rule); *Mockford* v. *Iles,* 217 Ind. 137, 145, 26 N. E. (2d) 42 (Ind. Sup. Ct., 1940).

8.

**PETITIONER'S AUTHORITIES FAIL TO SUSTAIN HIS POSITION.**

Petitioner still has cited no authorities contrary to respondent's position herein. He still relies on *Syracuse Broadcasting Corporation* v. *Newhouse*, 271 F. (2d) 910 (2d Cir., 1958), which he cites for the proposition that "Rule 16 confers no special power of dismissal not otherwise contained in the rules." In context (271 F. (2d) at 914), this statement was made immediately after the Court of Appeals' statement that the trial court had invoked Rule 16

> "* * * on the theory that dismissal at the pretrial stage is proper where it clearly appears that plaintiff will be unable to prove the allegations of its complaint."

The appellate opinion then properly pointed out that defendant's motion to dismiss on this ground should have been disposed of under the summary judgment procedure established by Rule 56. This in no way implies that a court cannot impose sanctions for disregard of pretrial procedures; *in fact the decision goes on to hold specifically that this would be proper*, where the particular facts justify imposition of this sanction. 271 F. (2d) at 914.

The case of *Societe Internationale* (*etc.*) v. *Rogers*, 357 U. S. 197, 2 L. Ed. (2d) 1255, cited and quoted at length by petitioner, involved a situation where plaintiff made repeated good-faith efforts to comply with a production order, but was deterred by fear of foreign criminal prosecution if it complied—a far cry from the present situation. In fact, as show in section 6 of this Argument, the *Societe Internationale* case supports respondent's position herein.

The general "due process" citations to C. J. S. at pp. 43-44 of petitioner's brief, are inapplicable: both the *facts* and

the *law* pertinent to this case (as shown above) establish that the dismissal was well within the trial court's discretion.

Petitioner's state court cases, quoted at pp. 37-40 of his brief, have been discussed above. His other authorities are not relevant to the issues of this case. Of these, *Re William Oliver*, 333 U. S. 257, 92 L. Ed. 682 (1948) may be noted. That was of course a criminal contempt case where petitioner was thrown in jail without being allowed to select counsel or to confront his accusers. It bears no resemblance of any sort to the instant case. *Thompson* v. *Selden*, 61 U. S. 195, 15 L. Ed. 1001 (1858), cited at p. 41 of petitioner's brief, involved only notices served by a *party*, on the opposing party, rather than notices served by the *court*, pursuant to its own rules and standing orders.

Petitioner's "*expressio unius est exclusio alterius*" argument with relation to Rule 41(b) and the local court rules (pp. 7, 28-31) and his generalized arguments against inherent and Rule 83 powers (pp. 17-28 of petitioner's brief) cannot stand in the face of the authorities cited in Sections 3 and 4 of this Argument.

## CONCLUSION.

The authorities cited here establish the existence and validity of the power exercised by the trial court in dismissing the action, and the undisputed record facts show a situation where the trial court was well justified, and well within its proper discretion, in dismissing the action upon the deliberate disregard of the pretrial setting by petitioner's counsel. The dismissal in the trial court and the affirmance by the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted.

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